

2011 WL 10619700 (La.Dist.Ct.) (Trial Motion, Memorandum and Affidavit)

District Court of Louisiana,
15th Judicial District Court.
Lafayette Parish

Derek PAGE,

v.

H. Cookie BENSON, et al.

No. 2009-4470-C.
May 11, 2011.

Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment

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MAY IT PLEASE THE COURT:

This is a personal injury action. There is no trial date set. Only three depositions have been taken. None of the defendants have been deposed. Defendants have moved for summary judgment. Plaintiff, Derek Page, opposes same.

PARTIES

The plaintiff is Derek Page (age 24). He suffers from “[Friedreich's Ataxia](#)”, a disorder affecting his heart and his muscles. This disease impacts the area of the brain that governs motor skills, balance and strength. It does not impact a person's intellect or reasoning. Frequently, as in Derek's case, it causes abnormal speech, an unsteady gait, and uncoordinated movements which worsen over time. Derek is wheelchair bound and requires a caregiver to assist him in many of the activities of daily living.

There are five defendants. Two defendants are corporate entities: Sterling Grove Housing Development, Inc. (Sterling) and C.S. Management, Inc. (CSM). Sterling owns an apartment complex in Lafayette, Louisiana named Ed Washington Place Apartments. Rent at this apartment complex is subsidized by the Department of Housing and Urban Development (HUD). Ed Washington Place Apartments is a multifamily dwelling that is supposed to serve the **elderly** and disabled.

The three remaining defendants are first of all, *related*. Harriet “Cookie” Benson is married to Bobby Benson. Monica Roger is Cookie Benson's biological daughter and Bobby Benson's step daughter. The family relationship is a key point in this case, as will be explained in more detail below. Monica Roger acts as the manager of the apartment complex; Bobby Benson acts as its maintenance man; Cookie Benson is believed to be their boss and/or part owner of the complex.

SUMMARY OF PERTINENT FACTS UNDERLYING TH IS CLAIM

Derek lived at Ed Washington Place Apartments from November 2008 until May 2009. When he first moved in the toilet in his apartment was serviceable and stable, but over time it began to wobble and become unsteady. The reports of the toilet needing to be stabilized began as early as December 2008. Over the remaining months of Derek's occupancy, the defendants (and primarily Bobby Benson) made multiple efforts to stabilize the base of the toilet but everyone of them failed.

For reasons that are still unclear to Derek, this toilet repair created a tremendous amount of conflict with Cookie Benson, Bobby Benson, and Monica Roger. Most of the conflict was verbal but it did eventually boil over into a physical attack upon Derek. Every incident was witnessed, and all but one was observed by Derek's caregiver, Tina Richard. Matters escalated to the point that Derek was repeatedly ridiculed and cursed at; Derek was warned if he continued to complain about his toilet he would be evicted; his caregiver, Tina Richard, was personally threatened and even told not to come back onto the property; Cookie Benson phoned the Ms. Richard's employer in an obvious effort to discredit her and have her re-assigned; the defendants applied bars onto the already unstable toilet that Derek warned them had not worked in another residence and caused him to fall (a fact the defendants ignored and predictably these bars caused him to fall in this apartment); and Bobby Benson even physically attacked Derek because he tried to take pictures of the repairs being attempted on the toilet.

Derek Page simply wanted his toilet fixed. The defendants could not accomplish this, and rather than get a new toilet they got enraged and eventually lost it. It is asserted that the defendant's handling of this matter gave rise to various civil actions, including one that faults them for having *only* family members involved in this transaction, and asserts that had there been an independent unrelated person in the management team; this escalation would likely not have progressed to the point that the defendants permitted it. Ultimately, Mr. Page sought the assistance of Congressman Boustany's office given the operation of Ed Washington Place Apartments falls under the federal jurisdiction of HUD. The toilet repair that defendants attempted to perform over five months was accomplished after one letter to Congressman Boustany's office.

The toilet was finally secure, but Derek was by this point reasonably and extremely frightened of the Benson-Roger team. He left Ed Washington Place Apartments in favor of another residence so he was freed from having to interact with them. As the evidence will show, however, Derek's physical [wounds healed](#) much faster than his anxiety. Even seven months after leaving Ed Washington Place Apartments (at the time his deposition was taken), Derek was still concerned about the defendants wanting to get retribution and the potential that they may seek to harm him.

PLAINTIFF'S LAWSUIT

Derek Page sued the defendants for among other things:

- 1) The failure to provide peaceful possession of his apartment;
- 2) Negligently maintaining the premises;
- 3) Intentionally and negligently inflicting emotional distress;
- 4) Tortious interference with the relationship between he and his caregiver; and
- 5) The failure to have independent oversight of the Benson-Roger family members.

Defendant asserts they are entitled to summary judgment of the 5 enumerated claims. Derek responds (A) that there is sufficient evidence already creating genuine issues of material fact on most if not all claims asserted and (B) that particularly as to Claim No. 5, the matter should not be disposed of until the defendants themselves are deposed.

APPLICABLE LAW CONCERNING MOTIONS FOR SUMMARY JUDGMENT

A motion for summary judgment is properly granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits submitted, if any, show there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law. [La. C.C. P. art. 966\(B\)](#). A fact is "material" if its existence potentially insures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the relevant legal dispute. [Cormier v.](#)

Wise, 93-1434 (La.App. 3 Cir. 6/1/94); 638 So.2d 688. A fact is “at issue” if there exists any reasonable doubt as to its existence. *Durrosseau v. Century 21 Flavin Realty, Inc.*, 594 So.2d 1036 (La.App. 3 Cir.1992).

La. C.C.P. art. 966C (1) states that “[a]fter adequate discovery or after a case is set for trial, a motion which shows that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law shall be granted.” Under La. C.C.P. art. 967, a trial judge clearly has the discretion to issue a summary judgment after the filing of affidavits or the judge may allow further affidavits or discovery to take place.

LIST OF EXHIBITS SUBMITTED IN OPPOSITION TO DEFENDANTS' MOTION

Because the five claims that defendants seek to be dismissed from all stem from the same fact pattern, the facts as established by the defendants' Answers and by deposition testimony, and by materials from the lease and HUD., are set out first. Thereafter, undersigned counsel addresses how there remain genuine facts in dispute that “potentially insures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the relevant legal dispute.” *Cormier, supra*.

Derek submits 7 exhibits in opposition to the defendants' motion:

Exhibit 1 - The Original Petition for Damages

Exhibit 2 - The Answer filed by all five defendants

Exhibit 3 - The Answer filed solely by Bobby Benson

Exhibit 4 - Excerpts of the deposition of Derek Page

Exhibit 5 - Excerpts of the deposition of Tina Richard

Exhibit 6 - HUD pamphlet entitled *Residents Rights & Responsibilities* which was “Attachment No. 8” to the lease signed by Derek Page.

Exhibit 7- HUD Public Housing Authority Ethics Reference Manual.

SIGNIFICANT ADMISSIONS BY THE DEFENDANTS IN THEIR ANSWERS

Defendant-Bobby Benson filed 2 answers. The first was filed jointly responding only in so far as allegations of negligence were concerned. He filed a second Answer individually, in which he incorporated all the admissions in the first Answer Exhibits 2 and 3) Significant admissions are contained in both Answers. The following chart sets out what facts the defendant admitted are true in their pleadings.

The Defendant admitted to the following with an unqualified response:

<i>Plaintiffs Original Petition for Damages</i>	<i>Answers</i>
Paragraph No. 3. Ed Washington Place Apartments is a housing development that services the elderly and disabled.	ADMITTED
Paragraph No. 14. Defendant-Bobby Benson attempted multiple times to repair the toilet.	ADMITTED

Paragraph No. 16. Derek Page requested that a licensed plumber be contracted to repair the problem once and for all.	ADMITTED
Paragraph No. 17. H. Cookie Benson advised Derek Page “that the buck stops here”	ADMITTED
Paragraph No. 21. On information and belief, Bobby Benson is the husband of H. Cookie Benson and the step-father of Monica Roger.	ADMITTED
Paragraph No. 22. On information and belief, H. Cookie Benson is the wife of Bobby Benson and the mother of Monica Roger.	ADMITTED
Paragraph No. 28. Mr. Page decided to take photographs and video of the toilet and bathroom area to document the nature of the problem.	ADMITTED
Paragraph No. 29. On April 9, 2009, Derek Page returned to his apartment with his caregiver, Tina Richard, to discover Bobby Benson in the apartment working again on the toilet.	ADMITTED
Paragraph No. 30. Wanting to document who was making the repairs, Derek Page took pictures of Bobby Benson.	ADMITTED
Paragraph No. 55. Derek Page advised Bobby Benson that this apparatus had been tried at an earlier residence without success.	ADMITTED
Paragraph No. 69. After the police officer spoke with Monica Roger outside of Derek Page' apartment, the police officer returned and advised my client and Tina Richard that <i>Tina Richard had to vacate the premises and she was not allowed to return.</i> (Emphasis in original)	ADMITTED

PERTINENT TESTIMONY FROM DEPOSITIONS OF DEREK PAGE

4.1 Derek Page was diagnosed with “[Friedreich's Ataxia](#)” at age 11, a condition that causes among other things muscle deterioration and made him wheel chair bound before moving into Ed Washington Place Apartments. (Derek pp. 10-14)

4.2 While disabled, Derek did not throw his body onto the toilet. His transfers are difficult but he is careful and gentle when moving from his wheelchair to the toilet (Derek, pp, 83-86)

4.3 Derek did not give permission to the defendants to enter his apartment while he was not there. (Derek, p. 270)

4.4 Derek never made it impossible or impractical to give him notice. Derek always has his cell phone handy and with him at all times. (Derek. P. 287)

4.5 Derek's concern about getting his toilet actually fixed and whether Bobby Benson had expertise to perform that repair was met with threats that Derek “was going to get a bedside commode and[he] was going to like it.” Bobby Benson claimed competency to make these plumbing repairs because “he's been going that kind of work since before [Derek] was shitting in [his] drawers.” (Derek p. 64)

4.6 Cookie Benson came to Derek's apartment to discuss the problems with the toilet repair and she became “irate” and told Derek that “...the buck stops here. You talk to me if you have any more problems.” (Derek p. 95)

4.7 Cookie Benson never told Derek who her boss was. Monica Roger never advised Derek who her boss was. Neither did Bobby Benson. He understood that “Ms. Monica was somewhat of a co-manager and her mother oversaw her and Ms. Benson was a repairman of sorts.” (Derek p. 266)

4.8 In paragraph 76 of his petition, Derek alleged that, “During this conflict regarding the toilet, Derek Page became aware that some of the defendants entered his apartment uninvited and without his knowledge while he slept.” The defendants' Answers admit that “Bobby Benson entered Plaintiff's apartment for the purpose of performing maintenance. Bobby Benson announced his arrival and was unaware that Plaintiff was sleeping in his bedroom. The remaining allegations contained in paragraph 76 of Plaintiff's Original Petition for Damages are denied for lack of sufficient information to justify a belief therein.” Derek had become so frightened by the defendants entering his apartment unannounced and without his permission, he began placing tape on his apartment door to tell if the door had been opened while he slept. (Derek, 195)

4.9 The defendants attempted to interfere with his relationship with Tina Richard by having the police instruct her not to come back on the property after the incident with Ms. Roger and her husband. (Derek, p. 180)

4.10 When Derek tried to photograph Bobby Benson, Benson grabbed Derek's right shoulder and left bicep and tried to wrestle the camera away from him. Tina Richard was present. Benson's grip was released only after Derek managed to raise his leg and try to kick Benson in the groin. (Derek, p. 151)

4.11 Derek did not provoke or touch Bobby Benson and never gave Bobby Benson permission to touch him. (Derek p. 270)

4.12 Derek stayed at a hotel following the attack because he was very, very scared and because his toilet was unusable (given Bobby never completed the work he was doing before the attack.) (Derek p. 164)

4.13 Fear existed before the attack by Bobby Benson, ala how he threatened to have only a bedside commode available for Derek, (Derek, p. 197) He became fearful when he realized they entered his apartment while he was asleep, and intensified with the assault. (Derek p. 201)

4.14 Derek experienced nausea and vomiting as a result of his anxiety over how the defendants treated him. (Derek p. 201)

4.15 A new toilet was delivered only AFTER Congressman Boustany's office was contacted. (Derek, p. 287)

4.16 Derek didn't want defendants to know his address even at the time of his deposition, because he was scared that they may harm him. This fear is a result of the defendants conduct toward him, of course, but also because of Derek having been hurt by “people with power who are more physically capable” than him. (Derek, pp. 269-270)

PERTINENT TESTIMONY OF THE DEPOSITION OF TINA RICHARD

5.1 [Friedreich's Ataxia](#) makes Derek limited and unable to walk. (Richard, p. 20)

5.2 Derek required assistance with meals, some toileting, bathing and showering. (Richard, 15-16)

5.3 Derek's “arms become his legs basically.” (Richard, p. 21)

5.4 Tina Richard was Derek's caregiver 7 days a week while Derek was at Ed Washington Place Apartments. (Richard, p. 23)

5.5 Derek could transfer to the toilet by himself and when he was able he “wouldn't drop himself” or his body onto the toilet. The seat was higher than normal, so Derek would simply use “place himself on the toilet.” (Richard, p 67)

5.6 Toilet was good upon beginning of lease, but eventually the base became unstable and toilet would move. (Richard pp. 25, 28)

5.7 Derek has cell phone with him all the times. (Richard, p. 80)

5.8 After Bobby Benson's initial attempt to repair the toilet, it leaked water into the apartment. Even after a second attempt to stabilize it, the toilet still shifted. (Richard, pp. 29-30) There were multiple reports of shifting and of flooding. (Richard, p. 44)

5.9 Later, Monica Richard's husband came to look at toilet. Monica Richard stayed by the front door with it open while the air conditioning running. Derek asked Tina Richard to close the door and when she did, Monica Roger's husband ran up to her and said "If you touch my fucking wife I will break your face or I'll kill you." The police were called and Tina Richard was instructed to leave the premises and told not to return. (Richard, pp. 31-33)

5.10 Tina Richard had to remain off the property for approximately 5-7 days, and did not return until Congressman Boustany became involved so that she could begin caring for Derek again. (Richard, 41, 43)

5.11 Tina Richard was present when Cookie Benson and her husband came by Derek's apartment to inspect the toilet. Bobby Benson told Derek that he was placing bars on the toilet. Derek objected. Benson replied, "It's not what you want, it's what you are going to get, whether you like it or not." When Derek said he did not want those bars, Benson told Derek he was going to get him a bedside commode then. Later, Cookie Benson returned to the apartment and warned Derek that he would be evicted if he continued to complain about the toilet. (Richard, pp. 72-73)

5.12 Tina Richard was present and witnessed Cookie Benson's "buck stops here" and her threat of eviction if Derek continued to complain of the toilet not being repaired. (Richard, p 100)

5.13 Cookie Benson phoned Tina Richard's employer and advised the employer that Tina had worked in a restaurant and questioned how the employer felt comfortable having someone with that level of experience being a caregiver. (Richard, p. 98)

5.14 Tina Richard personally observed and heard Bobby Benson react to Derek taking photographs. Benson told Derek that he had been doing this type of work since Derek was able to poo in his drawers. Then, Bobby Benson attempted to grab the camera from Derek, but the camera strap was around Derek's arm. Benson began twisting Derek's arm and wrist. Tina Richard asked Bobby Benson to stop, but he would not comply, so she ran to a neighbor's home to phone the police. (Richard, pp. 50-52)

5.15 Derek did not threaten Mr. Benson or curse at Bobby Benson before Benson physically attacked him. (Richard, pp. 97-98)

5.16 Derek was fearful because the defendant had keys to his apartment and started after to have a physical reaction to his anxiety, for example diarrhea and vomiting. These physical symptoms started on the night of the Benson-attack, and lasted about one week. (Richard, pp. 78-79)

5.17 Derek required Valium (and at the time Tina Richard's deposition was still taking Valium) in order to sleep. Tina Richard knows that Derek did not require Valium before this attack. (Richard, p.82)

5.18 When Derek left Ed Washington Place Apartments, the toilet was stable and repaired. (Richard, pp. 49-50)

HUD PAMPHLETE RESIDENTS RIGHTS & RESPONSIBILITIES.

Derek attaches to this memorandum a document produced by HUD entitled *Residents Rights & Responsibilities* (Exhibit No. 6). This document is published by the Secretary of Housing and Urban Development and its title page bears the seal of the secretary of that department. Moreover, it was *attached to the lease* signed by Derek Page when entering a rental contract with

the defendants. (Derek asks the Court to notice that Exhibit A of the defendant's brief is the lease. The last page of that document lists attachments appended to that document at the time of signing. Exhibit 6 herein was "Attachment No. 8" to the lease.)

This document is relevant because it forms part of the contract between the parties *and* because the defendants admit in their brief that "HUD mandates that CSM strictly adhere to the practices and policies promulgated by its department." (Defendants' brief, p. 2) Moreover, defendants admit that Monica Roger is an employee of CSM (Defendants' Material Facts NOT in Dispute, no. 7), and that Bobby Benson was employed by CSM as the maintenance supervisor at Ed Washington Place Apartments (Defendant's Material Facts NOT in dispute No. 8). Thus, Ms. Roger and Mr. Benson as agents of CSM and also must comply with HUD's policy and procedures.

This HUD Pamphlet sets forth some of the policies and procedures CMS, Ms. Roger and Mr. Bobby Benson were required to honor and enforce. Pertinent parts of this document include:

"Management agents and property owners communicate with residents on any and all issues.

Owners and managers give prompt consideration to all valid resident complaints and resolve them as quickly as possible." (Found on second page of Ex. 6)

As a resident of a HUD-assisted multi-family housing project, you should be aware of your rights.... [These include]

The right to live in a decent, safe, and sanitary housing ...

The right to have repairs performed in a timely manner, upon request, and to have a quality maintenance program run by management.

The right to be given reasonable notice, in writing of any nonemergency inspection or other entry into your apartment....

The right to equal and fair treatment and use of your building's services and facilities, without regard to ...disability.... (Found on the third page of Ex. 6; Emphasis added)

Plaintiff asserts that the rights enumerated in the HUD *Residents Rights & Responsibilities* pamphlet are NOT very different than what the law requires already. It is significant however that a part of the consideration and understanding between HUD and its tenants is that *repairs* are made timely per a quality maintenance program administered by the management and that non-emergent inspections are made after written notice is given.

Neither Ms. Roger's affidavit nor Mr. Benson's affidavit filed in support of their motion for summary judgment contained *any* information about a "quality maintenance program", nor do they delineate the basis of Mr. Benson's qualifications to perform plumbing repairs. Derek asserts that if such "quality maintenance program" existed at Ed Washington Place Apartments (and the same had been complied with) the incidents that spawned the instant controversy would have been avoided altogether. Exhibit No. 6 forms a part of the basis of the defendants' duties to Derek, and there are sufficient facts that a jury may find that they **neglected** their duties and caused harm to him. Moreover, a jury may find that a "quality maintenance program" would require competent repairmen to address plumbing issues. Bobby Benson's affidavit is silent regarding his_ credentials to make plumbing repairs, and given that he attempted to make the same over FIVE months, a jury could very probably find that a quality maintenance program would have detected that a new toilet needed to be installed so that the issue was resolved.

It is anticipated that defendants may claim that this document is submitted untimely and beyond the Court's consideration. Derek responds that the Court has three reasons to permit its introduction. First, it is a part of the lease which was relied upon by the defendants' in their motion. Second, the defendants ADMIT that they are obliged to comply with the HUD regulations and this

pamphlet enumerates same. Third, the Court has the authority to take judicial notice of this document as it is self authenticating and its introduction is permitted by the Code of Evidence.

In *Phillips v. K-Mart Corp.*, 588 So.2d 142 (La.App. 3 Cir., 1991), the appeals court stated that:

“Plaintiffs final argument concerns an evidentiary matter. Over the objection of counsel for plaintiffs, defendant was allowed to introduce into evidence a pamphlet prepared by the United States Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms entitled “Your Guide to Federal Firearms Regulation 1988-89”. We find no error in the admission of the pamphlet into evidence. See *La.C.E. arts. 202* and *902*. The pamphlet contained federal regulations of an administrative agency of the United States which is entitled to be judicially noticed. Consequently, this argument is without merit.”

The pertinent codal provisions relied upon in the *Phillips* case are reproduced herein:

LA. C.E. Art. 202. Judicial notice of legal matters

B. Other legal matters. (1) A court shall take judicial notice of the following if a party requests it and provides the court with the information needed by it to comply with the request, and may take judicial notice without request of a party of:

(e) Rules and decisions of boards, commissions, and agencies of the United States or of any state, territory, or other jurisdiction of the United States which have been duly published and promulgated and which have the effect of law within their respective jurisdictions.

C. Information by court. The court may inform itself of any of the foregoing legal matters in such manner as it may deem proper, and the court may call upon counsel to aid it in obtaining such information.

D. Time of taking notice. Judicial notice of the foregoing legal matters may be taken at any stage of the proceeding, provided that before taking judicial notice of a matter in its instructions to the jury, the court shall inform the parties before closing arguments begin.

E. Question for court. The determination of the foregoing legal matters shall be made by the court.

Art. 902. Self-authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.

Did the defendants comply with the “resident's rights” as defined in the HUD pamphlet (Exhibit No. 6)? Can it be legitimately debated that the defendants did NOT do as they ought if what Derek and Tina Richard recount about this toilet debacle is true? Is that not a genuine issue of material fact that should be determined by a jury? Derek submits if the defendants had complied with his “resident's rights”, he would never have been spoken to like he was by the Benson-Roger team, he would never have been attacked, and he never would have feared for his safety around the Bensons and Rogers. A jury may well see this like Derek and for that reason, the defendants' motion should be denied. Yet, there are other reasons as well.

Peaceful Possession

Defendants acknowledge their obligation under the law to provide peaceful possession to Derek, but claim they did so because (1) Derek was never evicted and (2) they had a right to enter his apartment to make repairs promptly. (Defendants' brief, pp. 5-6) Derek acknowledges that he was never evicted, though he does dispute whether the defendants exercised their rights to enter his apartment in a way that maintained his peaceful possession of the property.

Derek always had his cell phone and they could have easily contacted him to arrange for a convenient time to enter his premises. It was never impossible or impractical to notify Derek when Bobby Benson or anyone else wanted to attempt a repair and the defendants should have honored the rights of Derek as spelled out in the *Rights and Responsibilities* attachment to the lease. (Exhibit 6) Derek wanted his toilet fixed and (unlike the case the defendants cite in their brief) never refused entry for any of the defendants attempts at fixing it.

Yet, there is a larger point not addressed by the defendants' motion. "Peaceful possession" is more than the right not to be wrongly evicted or the apartment entered lawfully for repairs. The law and jurisprudence make clear that this encompasses not having a lessee's physical boundaries unlawfully violated as well.

[La. C.C. art. 2700](#) states that:

The lessor warrants the lessee's peaceful possession of the leased thing against any disturbance caused by a person who asserts ownership, or right to possession of, or any other right in the thing.

In a residential lease, this warranty encompasses *a disturbance* caused by a person who, with the lessor's consent, has access to the thing or occupies adjacent property belonging to the lessor. (emphasis added)

Note the second sentence [Article 2700](#) setting forth the warranty of peaceful possession makes explicit the right of lessee's to be free from "disturbances" caused by persons who have access to the property. Cookie Benson, Bobby Benson, and Monica Roger (and Monica Roger's husband) all had access to the property and each of them either verbally, emotionally *disturbed* or *physically attacked* Derek Page.

Peaceful possession has been ruled to encompass lessee's right to be free from criminal acts of other tenants whose presence on the property a landlord is deemed to control. [Boteler v. Lake Management, Inc.](#), 628 So.2d 86 (La. App. 5 Cir. 1993). In *Boteler*, one tenant was killed by another and a lawsuit was filed against the landlord regarding security and safety issues. Among the duties allegedly violated by the landlord was the failure to provide peaceful possession to the murder victim and his family.

The trial judge granted summary judgment to the landlord, but the appeals court reversed finding genuine issues of fact as to whether the landlord had reason to know or foresee the potential for criminal activity. Interestingly, the court notes the distinction in the jurisprudence in this types of cases where disturbances are caused by third parties over whom the landlord had no control (i.e. a trespasser) and those over whom they do have control over (co-tenants at the complex). Derek submits that if landlords have been determined to "control" *co-tenants* for the purposes of [La. C.C. art. 2700](#), then surely landlords control the *maintenance men and managers* of the complex.

If a maintenance man commits a crime or the managers and their family cause "disturbances", then per the jurisprudence they must answer for it per [La. C.C. art. 2700](#). It is further submitted there are genuine issues of fact regarding whether the defendants knew or should have foreseen that the issue regarding the toilet repair had become too emotional for THEM after Monica Roger's mother went through the apartment cursing and proclaiming "The buck stops here", and the Ms. Roger's husband threatened to "kill" Derek's care giver. It should have been evident, and it is likely the jury will find that this family was not capable of managing this issue without risk of the matter becoming even more personal for them and an issue in whicj they were losing perspective. Ignoring their repeated and unprofessional responses to this situation, the landlord continued to send in family members who ultimately lost it and attack Derek physically. This surely is not peaceful possession under the most restrictive definitions of that term.

At least two times, the defendants entered the residence without consent and at least one time while Derek was asleep. In fact, Derek became so afraid that the defendants may enter his apartment at night, that he started placing tape on his door to confirm whether it was broken the following morning. Indeed, it was Derek's system that in part revealed the defendants' unlawful and unreasonable intrusion into Derek's apartment. The lease did not permit this entrance. Indeed - this was trespass. Only in cases of emergencies (per the HUD rules - Ex. 6) are defendant's free from the requirement of providing "written" advance notice. These conditions did not exist. Frankly as far as Derek is concerned, all they had to do was call him. The defendants had Derek's cell phone number and he had his cell phone at all times.

Negligent Maintenance of the Property

The defendant claims that, "It is undisputed that the necessary repairs were made on every occasion a malfunction was reported." (Defendants' brief; p. 6) Not only is this fact vigorously contested, but it flatly and unequivocally denied. Indeed, it is unequivocally untrue. No "repairs" were made of this toilet until Derek had to get a Congressman involved to have the entire appliance replaced. This was after the official maintenance man (Bobby Benson) tried multiple times to fix the problems with the toilet and FAILED; as well as any attempts made by Monica Roger's husband. There is an obligation to *REPAIR* the toilet - not "try" to repair a toilet; or "sort of" repair a toilet; or "doing our best" to repair the toilet; the defendants' obligation was to *REPAIR* the toilet. Frankly, after five months of tinkering with the toilet, it remained UNrepaired.

Miriam-Webster defines "repair" as "to restore by replacing a part or putting together what is torn or broken : fix" and "to restore to a sound or healthy state: *renew*". This was not done by the defendant- Bobby Benson, Ms. Roger's husband or by anyone until Congressman Boustany's office became involved. The toilet was appropriately and finally addressed after the Congressman's office started placing calls.

Defendant cites two cases where the conditions of leased premises were found *not* to be negligently maintained. *Borne v. Willander*, 509 So.2d 572 (La. App. 3 Cir. 1987) regarded a faulty air conditioning system, and *Robinson v. Mike McKean*, 389 So.2d 451 (La. App. 2 Cir. 1990) concerned a leaky roof. Neither are dispositive of the issue at bar.

The mechanical and/or structural issues in those cases are dissimilar to the instant matter in that neither involved such repeated FAILED attempts at recognizing the relatively simple and economical solution: Just replace the toilet. More importantly, however, *BOTH OF THESE CASES WERE TRIED*. Neither of these cases stand for the proposition that defendants in a case like this one should be granted summary judgment because they UNSuccessfully attempt repairs *over and over and over and over* again without EVER accomplishing. If anything, *Borne* and *Robinson* stand for the proposition that this matters are appropriate for a full trial on the merits.

The defendants admit in their brief that "it should be noted that actionable negligence results only from the creation or maintenance of an unreasonable risk of harm to others." (Defendants' brief; p. 8) This is *exactly* what the defendants actions caused in this case, especially after they insisted on placing bars on (the unstable) toilet that Derek had told them had not worked before and would make him fall.

Defendants' Answers *admit* that Derek advised them that the bars they insisted on placing had been unsuccessfully tried on toilets in other places that he lived. Why then would the defendants insist on placing these bars on the toilet they could not otherwise make stable? Do these circumstances not create genuine issues of material fact for a jury to resolve as to create the defendant unreasonably created risks of harm by the way they maintained the premises? The bars that the defendant forced upon Derek made him fall at Ed Washington Place Apartments and *did not stabilize the appliance to the floor*, leaving him trapped on the floor until his care giver arrived to help him from being sandwiched between the toilet and the wall.

Under the circumstances, Derek submits that there is a genuine issue of fact regarding the competency of workmanship involved in the defendants' repeated repairs. What obviously needed to be done from the beginning - what Congressman Boustany

accomplished - was the replacement of the entire toilet. Once that was done, the toilet was stable. Derek submits that a jury may well find that the defendants should have figured out this was the true fix of the problem during the 5 months they were trying to contending with the wobbly toilet.

Intentional and Negligent Infliction of Emotion Distress

The leading Louisiana case on intentional infliction of emotional distress is *White v. Monsanto*, 585 So.2d 1205 (La.1991), which made official Louisiana's adoption of intentional infliction of emotional distress as a viable cause of action. One who by extreme and outrageous conduct intentionally causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm. *White* 585 So.2d at 1209. Thus, in order to recover, a plaintiff must prove (1) the conduct was extreme and outrageous, (2) the emotional distress of the plaintiff was severe, and (3) the defendant "desired to inflict severe emotional distress or knew that severe emotional distress would be certain or substantially certain to result from his conduct." *White*, 585 So.2d at 1209.

Derek believes there are *ample* facts that meet the *White v. Monsanto* tests even upon the few depositions have been obtained to date. It is important to note that this is not JUST a tenant dispute or a case that is about a toilet. It is not JUST a matter or unkind words or even a physical attack. Perhaps if this case were ONLY about those things, defendants' seeking summary judgment would be valid. But it is all those things and more - and the "more" - is what makes it "outrageous".

If the torts described above were done to an able-bodied tenant in a typical apartment complex, Derek admits that this case would not meet the *White* test. Yet, these were done to a person who is disabled in a complex that the defendants *admit exists* to serve the disabled.

- 1) The defendants are paid money by HUD to *assist* the **elderly** and disabled;
- 2) The defendants are receiving money to comply and honor the tenants rights as set forth by its lease and by HUD, yet they *threaten* the disabled by warning Derek that if he does not stop complaining about his toilet being unstable as he will be *evicted*;
- 3) Derek is forced to have bars placed on his UNSTABLE toilet even though he advises they *did not work* before ON A STABLE ONE in an earlier residence (and the defendants acknowledge knowing that they did not work before) and it causes harm;
- 4) Regardless of how many grievance policies the defendants can take pictures of for their brief, the realty at Ed Washington Place Apartments is that *"the buck stops here"* with Cookie Benson and that there actually is no help outside her family to oversee the incompetent repairman (her husband) and the incompetent manger (her daughter);
- 5) In contravention to the HUD *Rights and Responsibilities* pamphlet, the communication used by the defendants was littered with insults and threats, such as the threat by the incompetent repairman that Derek to start having to use a bedside commode *simply because this repairman is frustrated Derek reasonably wants a working toilet in his unit*;
- 6) In response to Derek wanting to know what the qualifications are of the complex' repairman to fix the toilet, the most he can learn about Bobby Benson's qualifications is that he "has been doing this since Derek's been shitting in diapers";
- 7) *To ensure that the "buck really DOES stop with Cookie Benson"*, Derek is physically attacked without any provocation whatsoever when wanting to document in photographs what is being done in MONTH NUMBER FIVE to fix this problem; and,
- 8) The caregiver who is there to provide essential help so that Derek can perform activities of daily living is instructed not to return to the property without ever having violated any law or rule or regulation, and the overseer phones the caregiver's employer to discredit her.

Under the circumstances, it is beyond dispute the reason that defendants did what they did to Derek was to cause him distress. And the result? Substantial and reasonable fear and the need for Valium even months after leaving Ed Washington Place Apartments.

Derek submits that this is sufficient to meet his burden of proof before a jury, let alone on overcome the defendants' motion for summary judgment. The whole reason Derek qualified for tenancy at Ed Washington Place Apartments is because he is disabled. Was he serviced - or terrorized? That he is treated like a bother is not extreme; to have his plumbing issues handled with such incompetence is a matter of mere tort law; but for a severely disabled person to be repeatedly insulted and threatened and ultimately attacked is outrageous.

The threshold for negligent infliction of emotional distress is much lower, and it is submitted that if defendants did what they did to Derek simply because they were being “unreasonable” than despicable, then he meets this test as well.

Tortious Interference

While there is jurisprudence cautioning from drawing too strict a test following the [9 to 5 Fashions, Inc. v. Spurney, 538 So.2d 228 \(La. 1989\)](#), there are genuine issues of material fact indicating that Derek Page's case survives under this very strict five-part test. The question raised by the defendants' motion is whether there are a genuine issues of material fact establishing (1) a corporate officer (2) interfered with a contract or legally protected interest (3) with the intention of making performance impossible or more burdensome (4) without justification (5) that caused damage.

Derek responds as follows:

In this case, (1) *corporate officers* named Cookie Benson and Monica Roger, (2) interfered with a *legally protected interest* (ala the right of the disabled at Ed Washington Place Apartments to be entitled to reasonable accommodations such as a caregiver due to his disability), (3) with intention to make performance *impossible or more burdensome* (by preventing Derek's caregiver from coming on premises and by calling Tina Richard's employer to discredit her credentials, (4) *without justification* (as the only sworn testimony regarding any disputes between Tina Richard and the defendants comes by way of the depositions of Derek Page and Tina Richard which prove Ms. Richard always comported herself reasonably and did not provoke the Benson-Roger team), and that (5) the defendants' actions *caused damages* (ala, interruption of Tina Richards' assistance to Derek and caused Derek heightened stress.

Derek obviously does not have to produce enough evidence to obtain a verdict from 9 or 12 jurors to overcome the defendants' motion for summary judgment, just enough evidence to show that he may prevail at trial. He submits the record evidences that and defendants' request for dismissal of this claim should be denied.

Failure to Have Independent Oversight of the Benson-Roger Team

Derek also faults the defendants for permitting the “foxes to guard the hen house.” It is submitted that under any “reasonable man” standard, it is foreseeable that the lack of independent oversight of a facility of disabled and **elderly** people is absolutely essential. Independent oversight would likely have “nipped this controversy in the bud” and relieved the peculiar pressure brought to bear by the Benson-Roger team. However, there is likely much more to this particular claim that if more time is permitted, will reveal a textual violation of HUD regulations.

The defendants admit that they must comply with the policies, procedures and regulations of the Department of Housing and Urban Development. Such regulations are replete with conflict of interest and anti-nepotism rules. (These rules are published in the Code of Federal Regulations and in HUD materials the types of which the Court is permitted to take judicial notice of and Derek hereby requests the Court do so.)

For example CFR, Title 24, Subchapter B, Chpt IV, Part 401(D) has regulations governing “owner/managers” which Derek has reason to believe applies to the defendants' organization structure. This regulations set out “property management standards” for owner/managers which are approved as “participating administrative entities or referred to as the “PA E”.

24 C.F.R. § 401.560

§ 401.560 Property management standards.

(a) General. Each PAE is required by section 518 of MAHRA to establish management standards consistent with industry standards and HUD guidelines. The management standards must be included or referenced in the Restructuring Plan.

(b) HUD guidelines. At a minimum, the PAE's management standards must require the project management to:

- (1) Protect the physical integrity of the property over the long term through preventative maintenance, repair, or replacement;
- (2) Ensure that the building and grounds are routinely cleaned;
- (3) Maintain good relations with the tenants;
- (4) Protect the financial integrity of the project by operating the property with competitive and reasonable costs and maintaining appropriate property and liability insurance at all times;
- (5) Take all necessary measures to ensure the tenants' physical safety; and
- (6) Comply with other provisions that are required by HUD, including termination of the management agent for cause.

(c) Conflicts of interest. The PAE management standards must also conform to any guidelines established by HUD, and industry standards, governing conflicts of interest between owners, managers, and contractors.

SOURCE: [65 FR 15485](#), March 22, 2000; [71 FR 2120](#), Jan. 12, 2006, unless otherwise noted. AUTHORITY: [12 U.S.C. 1715z-1](#) and [1735f-19\(b\)](#); [42 U.S.C. 1437\(c\)\(8\)](#), [1437f\(t\)](#), [1437f](#) note, and 3535(d).

In literature published by HUD addressing conflicts of interest, there are prohibitions of hiring “family members” which are defined as both children and even relations that are “step-children” or “step-parents”. (See Code of Ethics published by HUD; Exhibit 7).

To be completely frank, Derek is not yet 100%, clear that these specific provisions prohibit the mother of a manger to hire her step-father as a maintenance man, but there is a very strong likelihood that they do or that similar proscriptions are contained in other HUD regulations which Derek's counsel has not yet unearthed. This is not a matter that is “unknowable”, it simply is not yet known with certainty. Certainty is not the standard in matters before this court.

As noted earlier, La. C.C.P. art. 966C (1) states that “[a]fter adequate discovery or after a case is set for trial, a motion which shows that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law shall be granted.” Under [La. C.C.P. art. 967](#), a trial judge clearly has the discretion to issue a summary judgment after the filing of affidavits or the judge may allow further affidavits or discovery to take place.

The only depositions that have been taken to date are those of Derek Page, Tina Richard and Tina Richard's husband (who helped move Derek out of Ed Washington Place Apartments). No defendants have yet been deposed. Derek submits it is premature to dismiss this claim because there has been insufficient discovery regarding the specific organization structure and how it fits in the HUD regulations which they admit must be followed.

The strongest case to be made that it is a huge mistake for complexes filled with the **elderly** and disabled having *only* a family team in control is the circumstances that arose in this matter. The buck stopping with Cookie, the attack when evidence may have been gathered and sent to someone other than Cookie, that the only manager on site is Cookie's daughter. All of these facts create genuine issues by themselves, but there is very probably conflict of interest rules that have been broken.

It is noted that defendants' claim in their brief that HUD investigated this matter and that they took no disciplinary action against the Benson-Roger team. There is no evidence to this effect - it is not a matter discussed in any affidavit, attachment or deposition. It is unclear whether or what HUD looked into but this Court or a jury is not bound by such determination. The question that Derek intends to explore is whether there was a textual violation of anti-nepotism rules, *as only one part of the evidence supporting this claim*.

For the reasons discussed above, Derek requests that the Court deny the defendants' motion for summary judgment.

Respectfully submitted,

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<<signature>>

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